IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-672

T.I.M.E.-DC, INC.,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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The petitioner, T.I.M.E. - DC, Inc. ("T.I.M.E. - DC"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 8, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 517 F. 2d 299 and is reproduced in the Appendix to Petition for Certiorari recently filed by the International Brotherhood of Teamsters ("IBT") in No. 75-636 (App. 1).[1]

The pertinent District Court's preliminary opinions are reproduced in the IBT Appendix as follows:

December 31, 1971, 335 F. Supp. 246;
4 F.E.P. Cases 77 (App. 45)

January 20, 1972; 4 F.E.P. Cases 875
(App.50)

[1] Reference herein is made to that Appendix ("App.") with the knowledge and permission of counsel for IBT.

October 19, 1972; 6 F.E.P. Cases 690
(App. 56)
December 6, 1972; 6 F.E.P. Cases 703
(App. 79).

The District Court's "Final Order," dated March 2, 1973, unreported, is reproduced in the IBT Appendix (App. 94).

The District Court's Order of March 19, 1973, also unreported, amending the "Final Order," is reproduced in the IBT Appendix (App. 117).

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975 (App. 1). This petition of certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1.

Are statistics reflecting a present disparity in the proportion of white versus minority incumbent employees "dispositive" in a pattern and practice suit under Section 703 of Title VII of the Civil Rights Act of 1964, where the Court of Appeals has found that the employer has made "a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment"?

2.

In fashioning a remedy in a pattern and practice case does a District Court have discretion to award relief to individuals on the basis of the degree of injury suffered by each individual (as held by the District Court), or must all minority employees in the affected class be awarded relief, regardless of the injury suffered (as held by the Court of Appeals)?

3.

Are there different standards for determining individual relief under Title VII of the Civil Rights Act of 1964, depending upon whether the suit is an individual or a class action, or a pattern and practice suit?

4.

Where a union contract provides that laid off employees have first call to reinstatement rights for a three-year period, may individual minority employees who have never been employed in such positions and who are not found to have been affected by racial discrimination be granted priority over laid off employees?

STATUTORY PROVISIONS INVOLVED

Sections 703(a) through (j) and 707(a) through (e) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sections 2000e-2(a) through (j) and 6(a) through (e), are reproduced in the IBT Appendix (App. 119 to 124).

STATEMENT OF THE CASE

A

The Facts

As stated by the Court of Appeals, "This governmental pattern and practice suit is one more in an ever-increasing number of Title VII employment discrimination cases arising out of the trucking industry and primarily involving the past exclusion of minority group members from the job of over-the-road line-driver."[2] The Attorney General sued T.I.M.E. - DC, a transcontinental common motor carrier, and IBT under Section 707(a) of Title VII of the Civil Rights Act of 1964, as amended, alleging that the defendants were engaged in a pattern and practice of discrimination with respect to the employment of black and Spanish-surnamed American (SSA) persons.[3]

The essence of the government's claim was that T.I.M.E. -DC and its predecessors[4] had discriminated by assigning blacks

[2] 517 F. 2d 299, 302; App. 1,2.

[3] Two separate suits were brought and ultimately consolidated for trial, the first alleging a pattern and practice of discrimination at the employer's Nashville terminal and the second charging T.I.M.E. -DC and IBT with engaging in a pattern and practice of discrimination on a systemwide basis.

[4] T.I.M.E. -DC's merger history is set forth in the Opinion of the Court of Appeals at 517 F. 2d 299, 304; App. 5.

and SSA's to lower paying and less desirable job classifications while reserving for whites the higher paying and more desirable classifications, by refusing to promote or transfer minority employees to more desirable positions and by maintaining a system of promotions and transfers which perpetuated the effects of the company's past discrimination. It was also the claim of the government that IBT (by itself and through its Area Conferences and Locals) engaged in a pattern and practice of discrimination by entering into contracts which tended to perpetuate the effects of the employer's past discrimination by impeding the transfer of blacks and SSA's to more desirable jobs.

The contractual provisions in question are neutral on their face and (with one exception[5]) do not prohibit employees from transferring from one classification to another. However, it was alleged that the union contracts operated "to impede the free transfer of minority groups" inasmuch as a transferring employee could not carry over his seniority from one classification (unit) to another for lay-off and bid purposes. (Four separate units are created under the contracts: road, city, garage and office. An employee's unit seniority, which is computed from the date of his entry into that unit, is utilized to determine bid preference, lay-off and recall. Company seniority, on the other hand, is measured from date of hire and is utilized to compute fringe benefits such as vacations, pensions and holidays.)

B

The Consent Decree

During the course of the trial in the District Court the government and T.I.M.E.-DC entered into a consent decree[6] which "resolved those issues relating to T.I.M.E.-DC's alleged practice of hiring discrimination and its resulting obligation to affirmatively recruit and hire qualified Blacks and Spanish-surnamed Americans as new employees, and its alleged obligation to provide monetary compensation for those blacks and Spanish-surnamed Americans whom the United States alleged were individual and class victims of past discrimination."[7]

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[5] Relating to the Memphis terminal from 1958 to 1968.

[6] "Decree in Partial Resolution of Suit," App. 85.

[7] Government's Brief to the Court of Appeals, pp. 4-5.

The consent decree, a portion of which was expressly adopted by the District Court in its final order, provided that job openings at T.I.M.E.- DC terminals would first be offered to "those persons who may be found by the Court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964," and that after such individuals had been offered an opportunity to qualify for a line-driver (LD) vacancy T.I.M.E.- DC would fill future vacancies on a one-to-one (minority to white) hiring ratio until the terminal reached the minority-to-white ratio approximate to that of the city or metropolitan area in which the terminal was located.

The consent decree further provided for payment by T.I.M.E.- DC of $89,500.00 to the government for distribution to alleged discriminatees in amounts to be determined by the plaintiff's attorneys, not to exceed $1,500.00 to any one person. The consent decree left for trial the questions of whether there was in fact a pattern and practice of discrimination, and, if so, which, if any, employees were "individual or class discriminatees suffering the present effects of [such] past discrimination."

C

The District Court Order

After trial on the merits the District Court concluded on the basis of statistical evidence as well as certain "live" testimony that T.I.M.E.-DC had not hired minorities in proportion to their numbers in the various terminals, had not allowed minorities to engage in the choice jobs at the terminals such as line-driver and that the facially neutral union contracts had operated to impede the free transfer of minority groups. In short, the District Court concluded that the defendants had engaged in a pattern and practice of employment discrimination unlawful under Title VII, as alleged.

In determining what persons, if any, were discriminatees suffering the present effects of the unlawful discrimination and thus entitled to relief the Court asked the government to submit

a list of individuals for whom relief was sought. Such a list, entitled "Individuals for Whom Plaintiff Seeks Relief" was filed, categorizing into an "affected class" by terminal and job classification those incumbent employees for whom relief was sought. With one exception[8] the incumbents in question were blacks and SSA's assigned to city operation and serviceman jobs at T.I.M.E.- DC terminals that maintained a line-driver operation prior to 1969. Relief was thus sought with respect to only 20 of T.I.M.E.- DC's 51 terminals.[9]

The government asked the District Court to grant class and individual seniority relief to approximately 380 incumbent employees (of whom some 34 testified), asking that they be offered an opportunity to transfer to future vacancies in line-driver jobs (or other jobs from which they had been excluded) on the basis of their company seniority, which seniority they would take to the new job for all purposes, including bidding and lay off. The District Court found that while the incumbent minority employees in question were members of the "affected class" of discriminatees, not all of them were injured simply by being members of the class, and those who were injured were not all affected to the same degree. Consequently, the Court gave relief to employees within the class dependent upon the Court's view of the degree to which each was damaged by the employer's racial discrimination. This was done by dividing the members of the class into several groups:

Listed on Appendix A were 30 individuals who, according to the District Court, "have suffered severe injury because of the practice and plan of discrimination" by T.I.M.E.- DC and its predecessors. These individuals were given the right (unavailable to white employees) to transfer to road employment with seniority for bidding and lay-off purposes carried back to July 2, 1965 (the effective date of Title VII).

Four individuals were placed in the trial court's Appendix B, because the evidence was insufficient "to show clear and convincing specific instances of discrimination or harm resulting therefrom." These employees were given the opportunity to

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[8] A group of white employees at the Memphis terminal hired prior to the date the terminal ceased allowing city drivers to transfer to line-drivers.

[9] As recognized by the Court of Appeals at 517 F. 2d 299, 308; App. 12.

transfer to road jobs with seniority carried back to January 14, 1971 (the filing of the systemwide pattern and practice suit in the Northern District of Texas).

The remaining incumbents in the class were placed in Appendix C. While the Court indicated it had no evidence to show that these individuals were harmed by the discrimination to the class as a whole, they were nevertheless held entitled to road vacancies with seniority as of the date of future entry into the road unit. They therefore would have preference over the general public and over incumbent white city employees.

The District Court thus attempted to exercise its discretion and fashion a remedy consistent with the degree of injury suffered by the members of the affected class. In addition, the Court prescribed a number of conditions to guarantee that the employer would implement the provisions of the consent decree as well as the provisions of the Court's order. The relief granted was restricted to future vacancies, and a position was not to be considered vacant if there was a seniority roster employee on lay-off unless the lay-off had been in existence for at least three years. The Court also altered the Modified Seniority System of the Southern Area Conference and "specifically tailored relief to cover miscellaneous and unique circumstances at other terminals."[10] All parties appealed from the decision of the District Court.

D

The Court of Appeals' Opinion

On appeal the Court of Appeals affirmed the lower court's holding that the defendants had engaged in an unlawful pattern of employment practices, but rejected the trial court's gradations of relief as reflected by Appendices A, B and C. The Court held that the lower court had misconceived the purpose and procedural structure of a pattern and practice suit by requiring or permitting individualized proof of discrimination and injury. This approach, said the Court, would "defy reason and waste precious judicial resources," saying that "whatever evidentiary

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[10] 517 F. 2d 299, 309; App. 15.

hearings are required for individuals can well be postponed to the remedy." 517 F.2d 299, 319; App. 34.[11]

The Court of Appeals accordingly remanded the case for further evidentiary hearings, ordering the District Court to eliminate the distinctions prescribed for those in Appendices A, B and C, holding that "for all members of the class there should be full company employment seniority carry-over for bidding and lay-off purposes, subject. . . to the proper application of the qualification date principle."[12]

In addition to requiring the trial court on remand to eliminate the distinctions between members of the affected class as prescribed in Appendices A, B and C, the Court of Appeals states that there "may be need" for "an evidentiary exploration of the distinction between incumbents, former employees and applicants who were never hired."[13] Inasmuch as the government on appeal disclaimed "any attempt to seek review of the District Court's failure to grant individual relief to the rejected applicants or former employees in App. C,"[14] this suggests that on remand the District Court could grant relief beyond that sought by the government and beyond the scope of the issues before the Court of Appeals.[15]

In addition to ordering that there should be a new determination consistent with the Court's opinion as to relative relief for the various employees in the affected class, the Court of Appeals modified the District Court order in several other important respects. While acknowledging that the provision in the union contract granting laid off line-drivers a three year period in

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[11] The Court of Appeals apparently believed that the lower court had improperly received individualized proof of injury at the *liability* stage of the proceedings. This is evident from the Court's reference to postponement of evidentiary hearings "to the remedy" and from the Court's remark that, "For all we know, *at this stage* some on Appendix C may have suffered more egregious discrimination than those whom the government singled out to be persuasive witnesses to establish pattern and practice" (Emphasis supplied). In fact there was a full trial of *all* the issues before the District Court.

[12] 517 F. 2d 299, 321; App. 38.

[13] 517 F. 2d 299, 321; App. 38.

[14] 517 F. 2d 299, 317; App. 31.

[15] "The issue then is not really before us as to those applicants for jobs who were not incumbents." 517 F. 2d 299, 317; App. 31.

which to move into vacancies at their home terminal without competition was not adopted for discriminatory purposes, the Court held that this "would unduly impede the eradication of past discrimination" and consequently modified the decree to require laid off line-drivers to compete with members of the affected class for any vacancy "which is not a purely temporary one" at the terminal in question.[16] Nowhere in the Court's opinion is a "purely temporary" vacancy defined.

The Court also altered the Modified Seniority System of the Southern Area Conference. Under that system laid off line-drivers could compete for vacancies or bump junior line-drivers at other terminals within the Southern Conference.

As modified, a laid off LD in the Southern Conference may continue to bump junior LD's at other terminals, but may not move to another terminal where a vacancy exists and take priority over any affected class member. The laid off line-driver who bumps a junior driver at another terminal may exercise his right of recall when an opening occurs at his own terminal, but when an opening occurs at the terminal where the bump took place, members of the affected class may compete on the basis of seniority with the LD on lay-off who was bumped (or with any other LD on lay-off at that terminal). Finally, to "speed up the advancement of discriminatees into the LD position" members of the affected class in the Southern Conference may bid on LD openings at other terminals within the Conference in competition with employees at that terminal on the basis of employment seniority after all members of the affected class at that terminal have been given the opportunity to bid on the position.[17]

The Court thus remanded the case "for further evidentiary and judgmental proceedings," noting that the District Court should feel free to fully use special masters in view of the large numbers of people involved.[18]

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[16] 517 F. 2d 299, 322; App. 41.

[17] 517 F. 2d 299, 323; App. 42, 43.

[18] 517 F. 2d 299, 324; App. 44.

REASONS FOR GRANTING THE WRIT

This case presents questions of federal law of great importance not only to petitioner and the numerous other motor carriers similarly situated, but also to the thousands of persons of all race whom they employ. While Title VII cases of this nature have flourished in the federal courts, the cases have not resolved fundamental questions of proof and the allocation of proper seniority relief. The Fifth Circuit's application of the "rightful place" doctrine in the instant case is in direct conflict with that of the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974). Under these circumstances the Court should exercise its powers of supervision to resolve the conflicts and uncertainties which now exist.

1.

As recognized by the Court of Appeals, the District Court's conclusion that the defendants had engaged in an unlawful pattern and practice of employment discrimination was in large part based upon 1971 statistics reflecting the racial composition of various job classifications. The Court of Appeals agreed that such statistics are not only significant, but may be "dispositive" and "decisive."[19] While the Court was able to cite a number of other cases where the same approach was followed, the instant case demonstrates the virtually insuperable burden such an approach places on the employer in a Title VII action.

As noted by the Circuit Court, T.I.M.E.-DC is a nationwide motor freight system which is the product of ten mergers over a 17-year period. The consent decree entered into by T.I.M.E.-DC and the government was directed at resolving the issues as to alleged hiring practices of the numerous companies which were merged into T.I.M.E.-DC. The Court of Appeals specifically recognized the company's progress under the consent decree:

> "T.I.M.E.-DC's recent minority hiring progress stands as a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment."[20]

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[19] 517 F. 2d 299, 313; App. 23.

[20] 517 F. 2d 299, 316; App. 27, 28.

Specific percentages are cited by the Court of Appeals to demonstrate the actual progress made by the employer in this respect. Significantly, T.I.M.E.-DC's progress was made during a period when total employment declined substantially.

Admittedly when the Civil Rights Act was passed in 1964, there was racial imbalance in the work force of T.I.M.E.-DC's predecessors, as there was in the trucking industry in general and indeed in the nation's work force in general. Under the approach of the Court of Appeals presumably every employer and union is engaged in an unlawful "pattern or practice" of resistance to the full enjoyment of the rights secured by Title VII until through preferential hiring or firing the employer can meet the Standard Metropolitan Statistical Area (SMSA) ratios.

The legislative history of the Act reflects that the intent of the legislation was not to require an employer to maintain a racial balance in his work force, but rather to end discrimination in hiring.[21] The Court of Appeals disregards this legislative purpose by concentrating not on T.I.M.E.-DC's post-Act hiring and job statistics, but rather on statistics reflecting incumbency ratios. As indicated, a pattern and practice of discrimination will *always* appear under this approach unless and until an employer can meet the Standard Metropolitan Statistical Area ratios (in spite of the numerous deficiencies in these statistics, as demonstrated through expert testimony at the trial).

Once the government introduces statistics which demonstrate that the racial balance of an employer's work force does not match SMSA ratios, there is little the employer can do to rebut the government's "prima facie" case. In the instant case T.I.M.E.-DC demonstrated deficiencies in both the statistical and testimonial evidence presented by the government. Furthermore, the company analyzed the various instances of alleged discrimination to demonstrate that the individuals in the class were not the victims of discrimination, applying the analytical steps delineated by this Court in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).

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[21] *See, e.g.*, 110 Cong. Rec. 7212-7215 (4/8/64); EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 2067-2071; 2150; 3040.

The response of the Court of Appeals was that the District Court "was not compelled to credit" the employer's contention that there were no openings or the applicants had not completed their applications properly, and that the trial court *at the liability stage*[22] "was not required to sustain" the defendants' attack as to the credibility, availability or qualification of individual discriminatees.[23]

Thus the defendants have the burden of rebutting a prima facie case based upon statistics, but evidently under the decision of the Court of Appeals the trial court may disregard the employer's evidence as to the qualification or availability of individual discriminatees or the lack of job openings. In short, the employer is precluded from carrying the burden of proof assigned by the Court once the statistical prima facie case is established. Such a result was not intended by the drafters of Title VII.[24]

2.

Once a District Court has found an unlawful pattern and practice of racial discrimination, what sort of seniority relief is proper? That question, which has produced conflicting results in the Circuit Courts of Appeal, is the central issue in this appeal.

The trial court attempted to fashion a remedy consistent with the degree of injury suffered by the members of the affected class. The Court thus recognized that not all members of the class were necessarily injured and therefore entitled to substantial seniority carryover simply because they were in the class.

The Court of Appeals not only rejected the specific relief awarded by the District Court, but also criticized the Court for even considering individualized proof of discrimination and injury. While this may have been partially the result of the Circuit Court's belief that only the issue of liability was before the District Court,[25] petitioner submits that the District Court was well within its discretion in awarding relief on the basis of the degree of injury suffered by individual members of the class.

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[22] See note 11, *supra*, p. 8.

[23] 517 F. 2d 299, 315; App. 26, 27.

[24] See note 21, *supra*, p. 11.

[25] See note 11, *supra*, p. 8.

The plenary equitable power vested in the district courts under Title VII to fashion appropriate remedies for employment discrimination has often been recognized.[26] The remedy fashioned by a district court in a pattern and practice case such as the instant one should not be upset unless the court has clearly abused its discretion.

In the instant case the Circuit Court rejected the District Court's remedy and thus necessarily found that the Court had abused its discretion. The asserted basis for overturning the lower court's remedy was that the seniority relief given was insufficient to give all members of the affected class their "rightful place" in the company's work force.

The "rightful place" theory is that minority employees who have been discriminated against in the past should be given the opportunity to take their "rightful place" when job openings develop. The Fifth Circuit enunciated this doctrine in *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980 (5th Cir. 1969), and subsequently followed it in *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441 (5th Cir. 1973). As the Court stated in *Bing*, "how much seniority a transferee deserves should be determined by the date he would have transferred but for his employer's discrimination." 485 F. 2d 441, 450. However, in *Bing* the Court did not require proof of a prior indication of a desire to transfer from the city to the road, but held that upon proof of a *present* wish for transfer, the employee should be awarded seniority carryover from the city to the road as of the date the individual possessed road qualifications.

In *Rodriguez* v. *East Texas Motor Freight*, 505 F. 2d 40, 64 (1974), pending on certiorari, the Fifth Circuit held that *all* minority employees are to be given full carryover seniority based not upon any showing of when the individual would have transferred absent discrimination, but upon "whether he desires to transfer now."

The Fifth Circuit has moved one step further in the instant case, rejecting the trial court's examination of individual situations and holding that *all* minority employees within the class are

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[26] See *e.g.*, *Pettway* v. *American Cast Iron Pipe Company*, 494 F. 2d 211, 243 (5th Cir. 1974); *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974); *Sabala* v. *Western Gillete, Inc.*, 516 F. 2d 1251 (5th Cir. 1975)

entitled to full seniority carry-over for all purposes, irrespective of whether they were injured by discrimination. In so holding the Court acknowledges that its interpretation of the "rightful place" doctrine is in direct conflict with that of the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974).

In *Thornton* the Sixth Circuit specifically approved the "rightful place" theory enunciated by the Fifth Circuit, but rejected the "qualification date" formulation which gives a putative transferee carryover seniority as of the date he had the experience necessary to qualify him for a road driving job. Instead, the Court affirmed the District Court's grant of seniority carryover dating from six months after the transferee requested transfer or filed a charge with the EEOC. In so holding the Court noted that the qualification date formulation of the Fifth Circuit in *Bing* was not a strict application of the "rightful place" theory, in that "an employee might have become qualified to be a road driver on a given date, but he may have had absolutely no desire on that date to become a road driver." This criticism was specifically acknowledged but rejected by the Fifth Circuit in *Rodriguez*[27] and in the instant case.[28]

Petitioner agrees that the Fifth Circuit's wholesale granting of seniority relief irrespective of proof of individual injury is not a correct application of the "rightful place" rule. Instead, it constitutes the sort of reverse discrimination deemed impermissible by those responsible for the passage of Title VII.[29]

3.

The Court of Appeals also erred, it is submitted, in refusing to apply the "analytical steps delineated by the recent case of *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792 (1973)" on the basis that the case "is inapplicable to a pattern and practice suit such as the one before us."[30]

While *McDonnell Douglas* obviously involved a different set of facts than the instant case, petitioner submits that the

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[27] 505 F. 2d 40, 64.

[28] 517 F. 2d 299, 318; App. 32.

[29] See EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, p. 3040.

[30] 517 F. 2d 299, 316; App. 27.

criteria enunciated therein are as applicable when the government seeks relief on behalf of a class as when an individual files a claim. The petitioner's attempt to apply the *McDonnell Douglas* criteria to the instances of alleged discrimination in the instant matter was rather summarily rejected by the Circuit Court. It is respectfully suggested that only through such an analysis is it possible to determine whether individual employees within an "affected class" were actually damaged by racial discrimination, and if so, what it will take to put each worker in the "rightful place" he would have enjoyed absent the discrimination.

4.

Finally, petitioner submits that the Court of Appeals erred in upsetting that portion of the Court's final order designed to protect laid off incumbents. Under the terms of the District Court order a vacancy was not deemed to exist until it continued for three years. A laid off employee on the seniority roster where an opening occurred would therefore have preference to fill a vacancy without competition from members of the "affected class" for a period of three years. While acknowledging that the contractual provision in question was not adopted for discriminatory purposes, the Circuit Court nevertheless modified the lower court's decree to eliminate the contractual protection given to laid off line-drivers. Thus, under the decision of the Court of Appeals, "when a vacancy which is not a purely temporary one arises in the LD position at a T.I.M.E.- DC terminal, any LD on lay-off at that terminal may compete against members of the affected class on the basis of full employment seniority."[31]

Similarly, to "speed up the advancement of discriminatees into the LD position" the Court ordered changes in the Modified Seniority System of the Southern Area Conference.[32] The effect of this alteration will be to diminish the seniority rights of incumbent line-drivers within the Southern Conference, as well as to create administrative nightmares for the company.

In altering valid contractual provisions to permit the acceleration of the advancement of members of the affected class to

[31] 517 F. 2d 299, 322-323; App. 41.

[32] See p. 9, *supra*.

the detriment of incumbent employees the Court would require the Company and the union to engage in reverse discrimination contrary to the purpose of Title VII.[33]

As reflected by Section 703 (h), Congress did not intend that Title VII be used to abolish non-discriminatory seniority provisions. Furthermore, the legislative history reflects an intent to require employers to fill future vacancies on a non-discriminatory basis, not to accelerate the progress of one group of employees at the expense of another.

While purporting to apply the "rightful place" doctrine, the Court of Appeals went far beyond not only in granting carryover seniority relief on a wholesale basis, but in invalidating existing seniority provisions to permit the accelerated progress of minority employees at the expense of other incumbents.

CONCLUSION

WHEREFORE, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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[33] See notes 21 and 29, *supra*, pp. 11, 14.

Respectfully submitted,

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